88-1539

Office - Supreme Court, U.S.
FILED
MAR 15 1984
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1983

PATRICIA C. CARROLL,

Petitioner,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CARL D. HUGHES
MICHAEL GASSAWAY
STEVEN M. ANGEL
Attorneys for Petitioner
1501 N. Classen Boulevard
Suite 200
Oklahoma City, Oklahoma 73106
(405) 528-2300

0250
Form Appellate
•NJ (201) 257-6850•NY (212) 840-9494•PA (215) 563-5587
MA (617) 542-1114•DC (202) 783-7288•USA (800) 5 APPEAL

QUESTION PRESENTED

Can an applicant for federal employment maintain a cause of action against government officials for denying the applicant employment because of the applicant's prior exercise of First Amendment rights?

THE PARTIES

The petitioner, Patricia Carroll is an individual citizen of the State of Oklahoma. At the time this action arose, petitioner was a citizen of the State of Texas. Petitioner was an applicant for employment with the federal government at the Dyess Air Force Base Commissary in Abilene, Texas.

Respondent United States was initially a party defendant to this action. However, claims against the United States were dismissed at an earlier stage in this proceeding. No appeal was taken from this dismissal.

In addition, there are three individual respondents. David F. Ibbotson was the civilian personnel officer at Dyess Air Force Base, Ray Whitley was the Commissary Manager, and Anna Hammersmith was the commissary head cashier. All three individual respondents participated in the denial of employment to petitioner.

TABLE OF CONTENTS

	Page
Question Presented	i
The Parties	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	7
Certificate of Service	8

TABLE OF CITATIONS

Cases Cited:

Bush v. Lucas, 647 F. 2d 573 (5th Cir. 1981), subsequently affirmed, ___ U.S. ___, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983) 4, 5, 6

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) 3, 5

Contents

Page

Davis v. Passman, 422 U.S. 228 (1979) 5, 6

Statutes Cited:

5 U.S.C. §5596 2

28 U.S.C. §1254(1) 2

28 U.S.C. §2101 2

United States Constitution Cited:

First Amendment ..... i, 2, 3, 4

Other Authority Cited:

Executive Order 11491:

Section 6 2

Section 19(1) 2

APPENDIX

Appendix A — Per Curiam Decision of the United States Court of Appeals for the Fifth Circuit, December 16, 1983 ..... 1a

Appendix B — Decision by the United States Court of Appeals for the Fifth Circuit, June 20, 1983 ..... 3a

Appendix C — Order of United States District Court for the Northern District of Texas 10a

Contents

Page

Appendix D — Pertinent Portions of Statutes and Executive Order 11491 ..... 15a

Appendix E — Decision in *United States Air Force Dyess Air Force Base Texas, Abilene, Texas,* 3 FLRA No. 122 ..... 18a

No.

In The

Supreme Court of the United States

October Term, 1983

PATRICIA C. CARROLL,

Petitioner,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Patricia C. Carroll, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on December 16, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, at 721 F. 2d 155, No. 81-1540, decided December

16, 1983 on a petition for rehearing of 707 F. 2d 836, printed as Appendix A at pages 1a-2a and decided June 20, 1983 (3a-9a).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit rendered December 16, 1983. The decision sought to be reviewed was a decision on rehearing of an initial decision at 707 F. 2d 836. Under 28 U.S.C. §2101 this petition may be filed on or before March 15, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment I to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances.

Executive Order 11491, set forth in detail in the Appendix contains prohibitions against discrimination based on union membership in regard to "hiring, tenure, promotion, or other conditions of employment" [Section 19(1)]. In addition, Section 6 establishes an administrative procedure through which complaints concerning violation of the Executive Order could be processed.

The Back Pay Act, set forth in detail in the Appendix, 5 U.S.C. §5596 provided a basis for obtaining remedial action in the case of improper personnel actions.

STATEMENT OF THE CASE

This is an action brought by Patricia C. Carroll on a constitutional tort theory, as recognized in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), seeking to recover damages caused by defendants' violations of her First Amendment rights. Specifically, it is alleged that the three individual defendants in this case violated petitioner's First Amendment rights by refusing to employ petitioner because of her prior union activity.

The facts of this case are succinctly set out by the Fifth Circuit in its initial decision at 707 F. 2d 836 (duplicated in Appendix).

Patricia C. Carroll was a civilian employee at Dyess Air Force Base, Texas from July 1974 to May 1976. In 1976 she moved to Florida. Upon returning to Abilene, Texas, where Dyess Air Force Base is located, she applied for a position at the Commissary. Despite the fact that Ms. Carroll had previously worked at the Commissary, and had received high commendations for her past performance, she was not among a substantial number hired. The evidence reflected that the refusal to hire Carroll was based on her membership and involvement in a union. That is, during her initial employment at Dyess Air Force Base Commissary, she had served as a union steward. This prior union activity had been the basis for the Commissary not hiring Ms. Carroll in 1978. The individuals who made the decision not to hire Ms. Carroll were respondents David F. Ibbotson, Ray Whitley and Anna Hammersmith.

Upon the rejection of her application for employment, Ms. Carroll filed a complaint of discrimination under Executive Order 11491. This complaint was presented to an Administrative Law Judge who found that the refusal to hire Carroll grew out of an animus flowing from her earlier activity as a union steward. The Administrative Law Judge ordered that she be re-employed and

awarded back pay commencing on the date she should have been hired.

On review the Federal Labor Relations Authority sustained the Administrative Law Judge's findings of discrimination but modified the remedy. The FLRA concluded that under Executive Order 11491 an applicant for employment was not an employee and, therefore, not entitled to retroactive placement or back pay. This determination was based upon the Back Pay Act as it existed prior to the amendments of the Civil Service Reform Act. Accordingly, the FLRA merely ordered the government to give Carroll "first consideration" for appropriate positions that subsequently became available.

Thereafter, Carroll instituted suit in the United States District Court for the Northern District of Texas, alleging, *inter alia*, that the actions by the individual respondents violated her First Amendment rights. The District Court dismissed the claims against the individual supervisors based upon the existing Fifth Circuit decision in *Bush v. Lucas*, 647 F. 2d 573 (5th Cir. 1981) *subsequently affirmed*, ____ U.S. ____, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983).

Petitioner appealed this dismissal to the Fifth Circuit which initially ruled that petitioner's cause of action was not barred by *Bush v. Lucas, supra*. However, upon a suggestion for rehearing en banc, treated as a petition for panel rehearing, the Circuit reversed itself based upon this Court's decision in *Bush v. Lucas*, ____ U.S. ____, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983).

REASONS FOR GRANTING THE WRIT

This case presents an important development in the line of cases dealing with the liability to suit of government officials. Indeed, the decision by the Fifth Circuit, if not reversed, will create

a situation whereby federal officials have virtual immunity if their unconstitutional actions arise in the general context of federal personnel policies. Thus, there exist four special and significant reasons for issuing the writ of certiorari.

1. First, this case involves a question of federal law that should be settled by this Court. That is, the rights of citizens to sue federal officials for constitutional violations arising from the employment context needs to be settled. Thus, the Court, in seeking a balance between the need to protect fundamental constitutional rights and the abhorrence with interfering with federal personnel matters, has established outside parameters. However, what needs to be settled at this point is whether the Court meant to create a complete bar to constitutional suits in all cases which arise in the employment context.

This Court, in *Davis v. Passman*, 422 U.S. 228 (1979), recognized that a *Bivens* cause of action could be maintained in the employment context if there was a deprivation of constitutional rights. However, this Court, was careful to note that in *Davis* there existed no special circumstances which counseled hesitation in the absence of affirmative action by Congress.

However, *Davis* was obviously not intended to permit unlimited litigation in regard to constitutional claims arising in the employment context. Indeed, the Court in *Bush v. Lucas, supra*, clearly set forth the test for determining whether a *Bivens* type damage action was available. First, such an action would be defeated if the Court could discern any special factors counseling hesitation in the absence of affirmative action by Congress. Secondly, such an action would be defeated if there was a congressional determination foreclosing the damage claim.

In *Bush*, this Court found the existence of special factors counseling hesitation because of the detailed administrative

procedure Congress had established to deal with complaints concerning adverse actions.

In the present case, there does not exist these same "special factors." That is, the detailed procedures referred to in *Bush* have no application to an applicant for employment. Indeed, beyond the civil rights statutes, an applicant for employment has very limited rights of appeal. Certainly, they do not approach the detail which an employee enjoys. Indeed, in regard to Ms. Carroll, while there was an avenue of appeal created by an Executive Order, there has never been any suggestion that this procedure was such an elaborate remedial system that it should defeat a damage action. Rather, the Fifth Circuit merely opined that they could see no distinction between an employee and a former employee seeking re-employment, in this context. It is submitted that the distinction is that pointed out in *Bush*, an employee is subject to a detailed statutory procedure. Indeed, it must be noted that the very distinction between an employee and an applicant for employment is what kept Ms. Carroll from receiving any meaningful remedy for the violation of her constitutional rights.

2. The second issue is closely related to the first. That is, the decision by the Fifth Circuit appears to be in conflict with this Court's decision in *Bush* and *Davis*. As noted above, *Bush* does not foreclose all damage actions arising from the employment context. Rather, *Bush* requires that the action be defeated only if there are special circumstances counseling hesitation.

3. The third and fourth issues also are interrelated. Thus, this case presents a unique fact situation wherein an applicant for employment, as opposed to an employee, suffered a violation of constitutional rights. This case offers an important and special opportunity for this Court to clarify the federal law concerning the right to recover damages from federal officials in the employment context. This case presents a narrow situation which

would permit the Court to consider under what circumstances, if any, a federal official is liable for constitutional violations arising in the employment context.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CARL D. HUGHES
Attorney for Petitioner
1501 N. Classen Blvd.
Suite 200
Oklahoma City, OK 73106
(405) 528-2300

March 15, 1984

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of March 1984, I served three (3) copies of the Petition for Writ of Certiorari, by United States Mail, postage prepaid, to:

Solicitor General
Department of Justice
Washington D.C. 20530

James A. Wolfe
U.S. Attorney
Anthony W. Vaughn
Assistant U.S. Attorney
310 U.S. Courthouse
Ft. Worth, Texas 76102

APPENDIX A — PER CURIAM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DECEMBER 16, 1983

Patricia C. CARROLL,

Plaintiff-Appellant,

v.

UNITED STATES of America, et al.,

Defendants-Appellees.

No. 81-1540

United States Court of Appeals,
Fifth Circuit

December 16, 1983

Appeal from the United States District Court
for the Northern District of Texas.

ON PETITION FOR REHEARING

(Opinion June 20, 1983, 5 Cir., 1983, 707 F. 2d 836)

Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for rehearing is granted. The intervening decision by the Supreme Court in *Bush v. Lucas*, ____

U.S. ____, 103 S. Ct. 2404, 76 L. Ed. 2d 648 (1983) requires the recall of our original opinion.

In *Bush v. Lucas*, the Supreme Court declined to "authorize a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors" because the claims there presented arose out of "an employment relationship governed by comprehensive procedural and substantive provisions." *Id.* ____ U.S. at ____, 103 S. Ct. at 2406, 76 L. Ed. at 651. *Bush v. Lucas* involved an employee complaining of an adverse personnel action allegedly triggered by public statements by the employee. Administrative remedies were available and were exercised. The instant case involves a former employee who complains of mistreatment in reemployment because of union activity during the period of employment. A measure of administrative remedies was available and was exercised. We cannot make a principled distinction between an employee and a former employee seeking re-employment, in the context as here presented, sufficient to base a holding that the teachings of *Bush v. Lucas* do not control. We consider *Bush v. Lucas* dispositive.

The judgment of the district court is AFFIRMED.

APPENDIX B — DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, JUNE 20, 1983

Patricia C. CARROLL,

Plaintiff-Appellant,

v.

UNITED STATES of America, et al.,

Defendants-Appellees.

No. 81-1540

United States Court of Appeals,
Fifth Circuit

June 20, 1983

Appeal from the United States District Court
for the Northern District of Texas.

Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

This appeal requires that we distinguish those situations in which a *Bivens* plaintiff may secure direct judicial redress for a constitutional tort from those where alternative remedies are mandated. To do so we re-examine, particularly, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) and *Bush v. Lucas*, 647 F. 2d 573 (5th Cir. 1981).

Appendix B

FACTS

Patricia C. Carroll was a civilian employee, a GS-3 checker, at Dyess Air Force Base, Texas, from July 1974 to May 1976 when she moved to Florida. Upon returning to Abilene in September 1978 she sought re-employment. Despite high commendations for her past performance she was not among a substantial number hired. It developed that the refusal to hire Carroll was based on her membership and involvement in a union; during her earlier period of employment she had served as a union steward.

Alleging a violation of Executive Order 11491, subsequently replaced by the Civil Service Reform Act of 1978, the American Federation of Government Employees filed an unfair labor practice, alleging discrimination on the basis of union membership. An Administrative Law Judge, finding that the refusal to hire Carroll grew out of the "animus flowing from her earlier activity as a union steward," ordered that she be re-employed and awarded back pay comencing on the date she should have been hired.

On review, the Federal Labor Relations Authority (FLRA) sustained the ALJ's findings of discrimination but modified the remedy. The FLRA concluded that under Executive Order 11491 an applicant for employment was not entitled to retroactive placement or back pay. Instead, the government was ordered to give Carroll first consideration for appropriate positions that subsequently became available.

This suit, asserting first amendment rights followed. Originally the suit was against David F. Ibbotson, civilian personnel officer, Ray Whitley, commissary store manager and Anna Hammersmith, commissary head cashier, all of Dyess A.F.B. in both their

individual and official capacities and against the United States and various governmental entities. The court first dismissed the claims against the United States and its agencies, as well as the claim against the named defendants in their official capacities. The district court then entered an order which is the subject of the instant appeal, dismissing the demands of Carroll against Ibbotson, Whitley and Hammersmith individually.

BIVENS

In *Bivens*, plaintiff sought a personal money judgment against each of six federal drug enforcement agents for violating his fourth amendment rights. In this seminal case, the Supreme Court recognized a cause of action arising directly from the Constitution against federal agents for their misconduct. The Court declared: "Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment. . . we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." It is, however, apparent from *Bivens* that not every constitutional tort thus recognized would be enforceable in federal court with the full range of remedies generally available.

CARLSON

In *Carlson*, involving an eighth amendment complaint, the court expounded on *Bivens* and observed that a *Bivens* cause of action could be defeated in two situations:

> The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress [cites omitted] The second is when defendants show that Congress has

> provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.

446 U.S. at 18-19, 100 S. Ct. at 1471.

Thus *Carlson* teaches that an aggrieved *Bivens* plaintiff will be denied access to the full range of tort recovery only in (1) those instances in which Congress has explicitly provided an exclusive alternative, and (2) those instances in which Congress has not so affirmatively acted but special circumstances counsel measured hesitation. In each of those situations, the *Bivens* plaintiff may secure only the remedies as provided by Congress.

The *Bivens/Carlson* prescription takes cognizance of the fact that without the power to tailor proper remedies, the courts could not assure that the substantive provisions of the Constitution are honored. It is from this linchpin that the Court concludes that congressional remedies will be given precedence only when the alternative remedies are sufficient to preserve the interests underlying the various constitutional provisions, for

> . . . the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts' [cites omitted] But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual

> in the face of the popular will as expressed in legislative majorities. . .

Bivens, 403 U.S. at 407, 91 S. Ct. at 2010 (Harlan, J. concurring). Professor Walter Dellinger, in discussing when remedies provided by Congress would be allowed to preempt remedies otherwise available in the courts, opined that the Supreme Court will only defer to congressional remedies when "the court concludes that in light of the substitute remedy, the displaced remedy is no longer 'necessary' to effectuate the constitutional guarantee." Dellinger, W., "Of Rights and Remedies: The Constitution as a Sword," 85 Harv. L. Rev. 1532, 1549 (1972).

BUSH

In an action implicating the first amendment, the plaintiff in *Bush*, an aerospace engineer, sued the director of a federal space center alleging retaliatory demotion and defamation. We denied judicial remedies after completing the *Bivens/Carlson* analysis and finding that (a) the congressional remedies in protecting the first amendment interests involved, and (b) Congress had acted, albeit not "affirmatively," in an area involving "special factors counselling hesitation" (*i.e.*, the government in the employer-employee relationship).

The plaintiff in *Bush* sought damages for his demotion. Finding that under the congressional scheme he could be reinstated and recover back pay, we concluded that meaningful relief was readily available. As to that part of the *Bivens/Carlson* analysis, we stated:

> We stress the remedies made available by Congress to an aggrieved civil servant in order to emphasize

> the care Congress has taken to carefully balance the employee's rights as a citizen with the government's interests in the efficient conduct of the nation's business.

647 F. 2d at 576-77.

CARROLL

The Supreme Court's decisions in *Bivens* and *Carlson* and this court's decision in *Bush* compel reversal of the case at bar. In *Bush*, the plaintiff could readily be made whole. He could be reinstated to his position before demotion, his seniority and other job-related rights and benefits restored and any diminution in pay recovered. In short, that part of *Bivens/Carlson* was satisifed—the congressional remedies were as effective in securing the constitutional guarantees as those otherwise available to the judiciary.

In the case at bar that is not the factual scenario. As a result of an action by the FLRA reversing the ALJ, Carroll was not given the job she had been illegally denied. She was not given retroactive compensation in terms of pay and other elements of employment. The remedy of the FLRA for the illegal deprivation of a job was nothing more than a chance at employment if and when other jobs became available. Viewed relatively or absolutely, the inadequacy of this "remedy" is obvious.

The facts before us also fail to satisfy the other part of *Bivens/Carlson*. Even if Executive Order 11491 may be considered an appropriate substitute, the record is devoid of any indication that the executive order was a product of an effort to "carefully balance the employee's right as a citizen with the government's

interest in the efficient conduct of the nation's business." Further, in *Bush* we detailed legislation and jurisprudence reflecting that the relationship between the federal government and its employees was one which counselled hesitation. We doubt that the relationship between the government and those who apply for government jobs is a situation counselling hesitation. To date, neither the Congress nor the courts have accepted such a view. We are not thus persuaded. To uphold the district court's ruling would be the *memento mori* of *Bivens/Carlson* in this circuit. We decline the invitation to send forth that signal.

The judgment dismissing the complaint against Ibbotson, Whitley and Hammersmith is REVERSED, 522 F. Supp. 458, and the matter is REMANDED for further proceedings consistent herewith.

APPENDIX C — ORDER OF UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Patricia C. CARROLL, Plaintiff,

v.

UNITED STATES of America, United States Department of Defense, Department of the Air Force, Headquarters 96th Combat Support Group (SAC), Dyess Air Force Base, and David F. Ibbotson, Ray Whitley, and Anna Hammersmith, Defendants.

Civ. A. No. CA-1-80-72

United States District Court,
N. D. Texas,
Abilene Division

Sept. 9, 1981

ORDER

WOODWARD, Chief Judge.

Plaintiff brought this suit against the United States, David Ibbotson, Ray Whitley, and Anna Hammersmith for violations of her First Amendment rights alleging that the defendants refused to rehire plaintiff in retaliation to her former membership in and activities on behalf of a local government employee's union.

On June 26, 1981, this court entered an order dismissing plaintiff's suit against the United States and the individual defendants in their official capacities. Therefore, the remaining

cause of action is a "Bivens"-type[1] action against the individual defendants in their individual capacities.

Defendants filed a motion to dismiss and the court held a hearing on such motion on the 4th day of September, 1981 in Abilene, Texas. After considering the pleadings and the briefs and arguments of counsel, the court enters the following order:

The defendants base their motion to dismiss on the fact that plaintiff has pursued her administrative remedies and according to the holding in *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), plaintiff is precluded from bringing the present action.

Pursuant to Executive Order (E.O.) 11491, plaintiff filed a grievance with the Assistant Secretary of Labor for Labor Management Relations claiming she was denied employment at the Dyess Air Force Base Commissary due to her participation in the government employee's union. Executive Order 11491 was subsequently superseded by the Civil Service Reform Act of 1978 and although plaintiff's case was reviewed by the Federal Labor Relations Authority (FLRA), her case was decided on the basis of E.O. 11491. 3 F.L.R.A. No. 122, f.n. p.2 (July 31, 1980).

The FLRA ruled in favor of the plaintiff on July 31, 1980 and ordered the Air Force to give plaintiff first consideration in filling any position for which she was qualified including but not limited to the position of sales store checker, GS-3 intermittent. Back pay was not awarded since plaintiff was considered to be an unsuccessful applicant for Federal Employment.

---

1. *Bivens v. Six Unknown Federal Narcotics Agents*, U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Appendix C

It appears to the court that plaintiff has obtained an effective administrative remedy and thus, under the rule espoused in *Bush, supra,* the motion to dismiss must be granted.

In *Bush,* the Fifth Circuit held that a civil service employee could not maintain a *Bivens* action against his superior because he had pursued his administrative remedies. The analysis in *Bush* was rooted in the exceptions to an individual's right to recover damages against a Federal agent as set forth in *Bivens, supra.* Apparently, a plaintiff's recovery can be defeated in the following situations:

The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens, supra* at 396-397, 91 S.Ct. at 2004-2005.

The court in *Bush* found "special factors counseling hesitation" in that "the unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a *Bivens* remedy in the absence of affirmative congressional action." *Bush, supra* at 576.

In view of the foregoing, this court finds factors in the present case also counsel hesitation in allowing a *Bivens* claim.

Plaintiff argues the present case is distinguishable because the complainant in *Bush* was actually a civil service employee, whereas the plaintiff in the case at bar was a mere applicant for

employment. Therefore, plaintiff asserts she had no administrative and statutory scheme for redress, and she was unable to recover money damages.

The court does not find plaintiff's arguments persuasive. She was able to present her grievances to an administrative body which accorded her all possible relief. She was not left, as the congressional employee in *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), without any remedy.

The identical considerations in *Bush* are also present here. "Inferring a *Bivens* remedy in this case would tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established." *Bush, supra* at 577.

Plaintiff concedes that had her case arisen under the Civil Reform Act instead of under E.O. 11491, her case might well be barred by the first situation in *Bivens*. However, plaintiff contends that her remedies under E.O. 11491 were obviously limited since she could not receive back pay.

The court has determined that plaintiff received full relief allowable by applicable law at the particular time in question. That the law was subsequently changed does not bear on the fact that plaintiff pursued and received her full administrative remedies. The underlying theory on which *Bush* is based—a desire to avoid interference with the government's personnel affairs—applies to the facts of this case and dictates a similar result.

Appendix C

Further, plaintiff has alleged a conspiracy to interfere with plaintiff's employment relationship and the intentional infliction of emotional distress. The court is of the opinion that these allegations in the plaintiff's amended complaint are simply her *Bivens* claim stated in another fashion. As stated above such claims are not cognizable and therefore the plaintiff has failed to state a cause of action upon which relief can be granted.

Plaintiff has filed a motion for partial summary judgment stating that the issues determined by the FLRA would act as collateral estoppel in the present proceeding. In view of the foregoing, it is unnecessary to reach this particular stage of the proceeding and therefore the plaintiff's motion for summary judgment is denied.

A judgment will be entered accordingly.

APPENDIX D—PERTINENT PORTIONS OF STATUTES AND EXECUTIVE ORDER 11491

The Back Pay Act

5 U.S.C. §5596 (1976)

(b) An employee of an agency who, on the basis of an administrative determination or timely appeal, is found by appropriate authority under applicable law or regulations to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee–

(1) Is entitled, on correction of the personnel action, to receive for the period in which the personnel action was in effect an amount equal to all or any part of the pay or allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during this period.

Executive Order 11491

Section 1. *Policy* (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly

provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority. The head of each agency shall take the action required to assure that employees in the agency are appraised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organizaton.

Section 6 *Assistant Secretary of Labor for Labor-Management Relations.* (a) The Assistant Secretary shall--

* * *

(4) decide unfair labor practice complaints (including those where an alleged unilateral act by one of the parties requires an initial negotiability determination) and alleged violations of the standards of conduct of labor organizations;

* * *

Section 19 *Unfair Labor Practices* (a) Agency management shall not--

Appendix D

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

(2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment.

APPENDIX E — DECISION IN *UNITED STATES AIR FORCE DYESS AIR FORCE BASE TEXAS, ABILENE, TEXAS*, 3 FLRA NO. 122

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 6-CA-117

UNITED STATES AIR FORCE
DYESS AIR FORCE BASE, TEXAS
ABILENE, TEXAS

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2356

Complainant

DECISION AND ORDER

The Administrative Law Judge issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practice alleged in the complaint and recommending it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order and the General Counsel filed a response to the Respondent's exceptions.

Appendix E

The functions of the Assistant Secretary of Labor for Labor-Management Relations, under Executive Order 11491, as amended, were transferred to the Authority under section 304 of Reorganization Plan No. 2 of 1978 (43 F.R. 36040), which transfer of functions is implemented by section 2400.2 of the Authority's rules and regulations (5 CFR 2400.2). The Authority continues to be responsible for the performance of these functions as provided in section 7135(b) of the Federal Service Labor-Management Relations Statute, (92 Stat. 1215).

Therefore, pursuant to section 2400.2 of the Authority's rules and regulations and section 7135(b) of the Statute, the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, and the General Counsel's response thereto, the Authority hereby adopts the Administrative Law Judge's findings, conclusions and recommendation except as modified herein.

The Administrative Law Judge found that the Respondent violated section 19(a)(2) and (1) of Executive Order 11491, as amended, by refusing to rehire Mrs. Patricia C. Carroll because of her activity as a union steward for the Complainant, Local 2356, AFGE. As a remedy the Administrative Law Judge recommended, among other things, that the Respondent offer Patricia C. Carroll employment as a sales store checker, GS-3 intermittent, or if that job no longer exists, in a substantially similar position, and make her whole by the payment of that sum of money which she would have earned between the date of discriminatory failure to hire and the date of offer of employment, less any amounts earned elsewhere during that period of time.

Appendix E

The Comptroller General has previously decided, in matters arising under Executive Order 11491, as amended, that in cases of agency discrimination in hiring, the Back Pay Act of 1966, 5 U.S.C. 5596 (1970) "is apposite only to Federal employees and does not provide a remedy for unsuccessful applicants for Federal employment." *See* Decision No. B-180010, 54 Comp. Gen. 760, 763 (March 19, 1975). The Comptroller General further indicated that, in his opinion, the Assistant Secretary of Labor for Labor-Management Relations "may not direct an applicant's appointment [to a civil service position] even though he is authorized to take affirmative action in cases involving discrimination in hiring as a result of an unfair labor practice." In so concluding, he noted that "the authority to appoint is in the administrative agencies under regulations issued by the Civil Service Commission [now the Office of Personnel Management]." *Id.* at 763-764. *See also Federal Employees Metal Trades Council and Mare Island Naval Shipyard,* 3 FLRA No. 90, wherein the Authority, based upon an interpretation by OPM, set aside as violative of applicable law, civil service regulations and instructions, an arbitrator's award requiring a grievant to be retroactively appointed to a career position with back pay. In view of the foregoing, the Authority is constrained to conclude that the remedial order recommended by the Administrative Law Judge must be modified as set forth below.*

* In conformity with section 902(b) of the Civil Service Reform Act of 1978 (92 Stat. 1224), the present case is decided solely on the basis of E.O. 11491, as amended, and as if the new Federal Service Labor-Management Relations Statute (92 Stat. 1191) had not been enacted. The decision and order does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order.

Appendix E

ORDER

Pursuant to section 2400.2 of the rules and regulations of the Federal Labor Relations Authority and section 7135 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Air Force, Dyess Air Force Base, Abilene, Texas, shall:

1. Cease and desist from:

(a) Refusing to employ Patricia Carroll, or any other applicant, because of membership in, or activity in behalf of, Local 2356, American Federation of Government Employees, AFL-CIO.

(b) Discouraging membership in Local 2356, American Federation of Government Employees, AFL-CIO, or any other labor organization, by discrimination in respect to any term or condition of employment, based upon considerations of union membership.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following affirmative action in order to effectuate the purpose and policies of Executive Order 11491, as amended:

(a) Give first consideration to Patricia Carroll, in filling any position for which she may be qualified, including but not limited to the position of sales store checker, GS-3 intermittent, without regard to her union activity on behalf of Local 2356,

Appendix E

American Federation of Government Employees, AFL-CIO, or any other labor organization.

(b) Post at its Abilene, Texas, facility, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Base Commander and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Base Commander shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 31, 1980

s/ Ronald W. Haughton
Chairman

s/ Henry B. Frazier, III
Member

s/ Leon B. Applewhaite
Member

FEDERAL LABOR RELATIONS
AUTHORITY

Appendix E

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to employ Patricia Carroll, or any other applicant, because of membership in, or activity on behalf of, Local 2356, American Federation of Government Employees, AFL-CIO.

WE WILL NOT discourage membership in Local 2356, American Federation of Government Employees, AFL-CIO, or any other labor organization, by discrimination in respect to any term or condition of employment, based upon considerations of union membership.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights assured by Executive Order 11491, as amended.

Appendix E

WE WILL give first consideration to Patricia Carroll, in filling any position for which she may be qualified, including but not limited to the position of sales store checker, GS-3 intermittent, without regard to her union activity on behalf of Local 2356, American Federation of Government Employees, AFL-CIO, or any other labor organization.

_____

United States Air Force, Dyess Air Force Base, Texas, Abilene, Texas

Dated: _____ **By:** _____
(Base Commander)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: Bryan & Ervay Street, Old Post Office Building, Room 450, Dallas, Texas 75221.

Appendix E

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

Case No. 6-CA-117

In the Matter of

UNITED STATES AIR FORCE
DYESS AIR FORCE BASE, TEXAS
ABILENE, TEXAS

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2356

Charging Party

Steven M. Angel, Esquire
Federal Labor Relations Authority
Region VI
Bryan & Ervay Street
Old Post Office Building
Room 450
Dallas, TX 75221
For the General Counsel

Jerry M. Brasel
Central Labor Law Office
Randolph Air Force Base, TX 78148
For the Respondent

Appendix E

Milton Colia
96th CSG/JA
Dyess Air Force Base, TX 79607
For the Respondent

Pete Evans
National Representative, 10th District
American Federation of Government
Employees, AFL-CIO
203 Timothy Trail
Duncanville, TX 75116
For the Charging Party

Before: JOHN H. FENTON
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a proceeding pursuant to the Federal Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. Section 7101 *et seq.*, which arose upon a complaint filed on August 20, 1979 by the Regional Director, Region 6, Federal Labor Relations Authority, against the Department of the Air Force, Dyess Air Force Base, Abilene, Texas. The complaint alleged that Respondent violated Section 19(a)(2) and (1) of Executive Order 11491 on December 13, 1978, by refusing to rehire Mrs. Patricia C. Carroll because of her activity as a steward for Local 2356, AFGE. Respondent's defense, in substance, is that Carroll was not hired because she had indicated an intention to bid out of the Commissary on the basis of her status as a reinstatement eligible, and thus would not serve long in the Commissary; because

she had applied undue pressure in her effort to be hired; and because it hired pursuant to a special (local) recruitment program designed to meet the requirements of its equal employment opportunity program.

At the hearing all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. Counsel for the General Counsel and for Respondent filed briefs. Upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions.

Facts

1. Mrs. Patricia C. Carroll first worked as a GS-3 checker at the Dyess Air Force Base Commissary from July of 1974 to May, 1976. She was a very active and successful Union steward from March of 1975 until she left. She described nine grievances she won, including one addressed to pre-selection of the Head Cashier which redounded to the benefit of the present incumbent, Mrs. Anna Hammersmith. She also complained to the Office of Special Investigations about thefts which she said had been ignored by management. She testified that when she resigned, agents of that Office told her to immediately contact them in the event she ever was refused reemployment. When she left Dyess to accompany her husband to Orlando, Florida, she requested and received outstanding letters of recommendation from Hammersmith, Major Root and the Dyess Commissary Officer. She was described by Hammersmith as "very efficient . . . dependable and conscientious," an "outstanding" employee and a "great asset to any organization." The other two were equally effusive in their praise (G.C. Exhibits 4, 15(a) and 15(b)).

Appendix E

2. Carroll was a cashier in the Orlando Navy Exchange from September of 1976 to May of 1977 and then moved to Arizona, where she worked as a GS-2 intermittent checker in the commissary at Luke Air Force Base for approximately 90 days ending in August, 1978. During that time she used sophisticated cash registers similar to those in use at Dyess. In mid-August she telephoned Mrs. Hammersmith to inform her that she was returning to Abilene, and to inquire about the availability of cashier jobs and housing. Hammersmith told her that they always need cashiers and agreed to call Personnel to determine whether Carroll should attempt to transfer or should resign and reapply. Then or in their next conversation, Carroll was told that the available jobs were GS-3 intermittent part-time, which limited employees to 20 hours per week whenever needed.

3. In early September Carroll moved to Abilene and visited Hammersmith at work. She was told that the vacancies existed but were not yet being filled, and that she should apply at the Personnel section, making sure that she indicated her willingness to accept intermittent employment. At that time she was introduced as a former cashier to Mr. Ray Whitley, Commissary Manager. He also stated that cashiers were always needed. In mid-September Carroll filed an application with Personnel. Again she was told that there were openings but it was not known when they would be filled. She provided Dyess officials with a letter of reference from her supervisor at Luke, which noted that she was highly trained in the NCR 255/726 cash register and that she was number two in an Air Force Competition. (G.C. Exhibit 15(c)).

4. On October 24, 1978, Department of Defense was placed under a Presidential freeze which permitted it to replace only 50% of attrition. This lasted until February of 1979, and intensified "raiding" among components of Department of Defense to

acquire needed personnel. Because of the relatively low grades and income of Commissary intermittent cashiers, Base management had reason not to increase its vulnerability to such turnover by hiring reinstatement eligibles who could almost immediately bid out to better jobs. Employees without status would receive temporary appointments and be required to work several months before acquiring status and then an additional 90 days before being eligible to bid out. A perhaps more stable, if less experienced staff could in this manner be assembled.[1]

5. From mid-September until her interview on December 13, Carroll regularly visited Hammersmith at the Cashier's Cage in the Commissary and inquired about job developments. Although never accusing Carroll of being discourteous or unfriendly, this persistence, according to Hammersmith and Assistant Head Cashier Goldie Wiley, was received as pressure by Hammersmith, and constituted "hassling" which Hammersmith came to resent.[2] Hammersmith testified that Carroll constantly asked when she would be hired, and said she would make trouble if she was not. Carroll acknowledges having told her about the invitation to report any refusal to rehire to the Office of Special Investigations, and further, that if she was not "sent for consideration" for employment (made eligible by Personnel) she would question it.

---

1. This effort to analyze an important element of the defense is complicated by the fact that six of the eight cashier's hired for whom personnel records were available were wives of servicemen, and therefore subject to relocation with their husbands. Hammersmith testified that there is much turnover among military dependents.

2. Thus, Wiley told Hammersmith she felt that Carroll was putting pressure on her, and Hammersmith responded that she did feel she was being pressured. Nevertheless Wiley described the visits as friendly. They were annoying she said, because the questions repeatedly put could only be answered by Personnel.

On several occasions she asked Hammersmith to call Personnel "right then," while she waited, and she once inquired about the hours worked by part-timers, saying that she was "checking up" on her. At about the time of her interview she informed the Legal Office that she could be reached at the Commissary, so confident was she of such employment. In one such conversation, Carroll asserts, Hammersmith said when asked whether Carroll would get the job, that she did not know, that she had to discuss it with Whitley and still had more people to interview. Hammersmith and Whitley testified that she had a free hand in hiring.

6. In late November or early December, Commissary Manager Whitley visited Civilian Personnel Officer Ibbotson to inquire about progress on the list of eligibles for cashiers. In the course of their conversation Ibbotson told Whitley that Carroll had been a Union steward. When Whitley reported back to Hammersmith as to when the list would be sent down, according to his and Hammersmith's testimony he remarked that he did not know that Carroll had been a Union steward. Hammersmith testified that she replied that Carroll was, but that she did not think that that was an issue, and that Whitley agreed it was not.

7. Helen Blair, a clerical assigned to Whitley's office, and a Union member, testified that she overheard a conversation between Whitley and Hammersmith in December when the former inquired of the latter about the progress of interviews. Hammersmith allegedly responded that she didn't know why she had to interview Carroll, who knew the NCR register, had worked there and used to be the steward, to which Whitley allegedly responded "we don't want anymore of that Union in the

Commissary."[3] This conversation allegedly occurred at the Head Cashier's cage, out of Mrs. Blairs sight, and was ended by a phone call. Rozel Collins, also a clerical assigned to Whitley, and a Union steward,[4] testified that in December she overheard a conversation involving Whitley, Hammersmith and Assistant Head Cashier Wiley. Allegedly, Whitley asked Hammersmith what kind of person Carroll was, to which Hammersmith replied "Well, she's a Union steward and she just keeps a lot of hell going." Whitley allegedly responded "Well, we don't want anymore of that Union shit here . . . and furthermore I'm not going to have anymore of that Union shit in here."[5] Wiley, Whitley and Hammersmith denied that any such conversation took place, although the latter two did admit to a discussion of Carroll's former role as steward, as related above.

8. On December 6, Personnel forwarded to the Commissary a list of 12 applicants eligible for consideration, to be interviewed by Hammersmith for the nine vacancies. Carroll was interviewed on December 13. On that or some earlier occasion, Carroll had indicated that once hired, she would be eligible to bid out without delay. The applications had been screened by Goldie Wiley, who told Hammersmith that Carroll had extensive cashiering experience and probably would make a good cashier. Nine employees were

---

3. I consider it insignificant that the word "union" was omitted from Blair's statement given the Inspector General, as it is clear from the context that the reference was to the Union.

4. She received a promotion while serving in that capacity.

5. Ms. Collins gave a statement to the Inspector General in which she did not mention the Union in the words attributed to Whitley, and substituted "mess" for the expletive.

selected, all from the so-called local labor market (sometimes called the Texas Employment Commission (TEC) source), which is to say they enjoyed no Civil Service status. Neither Carroll nor Wiley and Brier, the other two reinstatement eligibles on the list for consideration was hired. As noted, Respondent in part defends on the ground that such reinstatement eligibles were unlikely to last as long as temporary employees, and that Wiley and Brier were not Union activists. However, Hammersmith stated on the personnel form that Wiley did not have enough experience on the cash register, and said simply, with respect to Carroll and Brier, that she had selected other candidates.

Carroll testified that she asked Hammersmith why she had not been hired and was told that she had "hassled" Hammersmith, who took this and other things into consideration, and that Hammersmith did not have to give her a reason. Hammersmith testified that she told Carroll she decided not to hire her because Carroll was harrassing her. On examination by Counsel for the General Counsel she gave as her reasons the fact that Carroll had told her she had been told she did not have to wait 90 days before applying for another job (taken by Hammersmith as a statement that she would not stay), and that she felt that Carroll was putting pressure on her and threatening to make trouble if she was not hired. Hammersmith admitted that Carroll had the most experience among the applicants in operating a cash register, that she knew reinstatement eligible applicant Brier already had another job and was looking for full-time employment and that reinstatement eligible applicant Wiley lacked experience. Their status as reinstatement eligibles was, according to Hammersmith, important only if there was reason to believe that they would seek to bid out at an early date. She admitted also that selected applicant Frazier was as likely as a reinstatement eligible to bid out. She

also conceded that the EEO program had no "real" impact on the decision whether to hire Carroll.[6]

9. Although evidence was adduced that Carroll was not thereafter considered for any similar vacancy because such jobs were filled at the GS-2 level, below her minimum acceptable level, a Certificate of Eligibles was in fact issued for GS-3 checkers on January 26, 1979 and one person was selected from it (G.C. Exhibit 17). Consistent with his position that none of the three reinstatement eligibles had any right to be considered for the vacancies filled in December, Civilian Personnel Director Ibbotson did not refer them for consideration by the hiring officials in the Commissary.

10. Carroll filed a complaint of "unfair employment practices" with the Inspector General on an unknown date sufficiently early to provoke an investigation during the period from January 15 to 18, 1979. That investigation was reopened, in part, upon Carroll's request that Inspector General should interview other witnesses and consider the impact of her activity as a Union steward upon her nonselection, and further investigation took place from March 1 through 8. Thereafter a Report of Investigation issued, a part of which was furnished to Carroll pursuant to an FOIA request, which is in evidence as G.C. Exhibit 16. It records that Base management defended its nonselection of Carroll exclusively on the ground that selection of the successful applicants was based upon the requirements of the Base EEO plan and its special recruitment program. No

---

6. Failure to rely on this defense is unsurprising, as all applicants were female and the hiring of four minority members, while diminishing opportunities for whites, hardly eliminated Carroll's prospects for selection to one of the five remaining vacancies.

mention was made in that Report, or the first Report, of the retainability defense upon which Respondent relied so heavily in this proceeding. The relevant "special recruitment" FPM provision requires that agencies, in deciding which source or sources of candidates to use, must determine "which is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints and meet the agency's affirmative action goals."

11. Civilian Personnel Director David Ibbotson testified that his statement to the Inspector General was a fair statement of the reasons for nonselection of Carroll. That statement simply parroted the quoted FPM provision. However, he otherwise placed great, or at least particular emphasis, on the fact that the three reinstatement eligibles were not hired in order to keep cashiers available, as they were assumed to wish entry into the Commissary as a springboard to better positions elsewhere. Nevertheless, there is no indication that such considerations were communicated to the selecting official, nor that they entered significantly into the selection process. Thus Brier and Wiley were rejected for other reasons, and Carroll was allegedly rejected because she had "hassled" or "harassed" Hammersmith and also because she had indicated a disposition to bid out early.

Analysis and Conclusions

The General Counsel asserts that the nonselection of Carroll was based upon animus flowing from her earlier activity as a Union steward, and that the circumstantial evidence supporting this view is overwhelming. He lays particular stress upon the shifting and "pretextual" nature of the various bases offered by management in explanation of its action. Management asserts it had a legitimate reason for avoiding the reinstatement eligibles — two of whom were not union members — in their likely proclivity to use cashier

jobs as stepping stones. Direct hires, on the other hand, would be likely to stay, even if involuntarily. To this it adds the fact that Carroll tried to pressure Hammersmith to hire her, that she used her stewardship "as a hammer to get the job." Finally (though not necessarily as a matter of priority), it asserts that the local recruitment program, with its EEO component, explains the failure to rehire Carroll. It is, of course, reliance on these multiple grounds which the General Counsel seeks to exploit.

There is a strange irrelevancy to the defense based on the local recruitment program. All those eligible for consideration were in fact local, all were female, minority hires left ample vacancies, and the asserted TEC source evaporated. Most importantly, Hammersmith, the selecting official according to management, testified that the EEO program did not bear upon Carroll's nonselection. Likewise, she testified that Carroll's status as a reinstatement eligible was relevant "only in a way," an apparent reference to the fact that it was not such status, but rather indication of an intention to use such status to bid out, that mattered. While the local recruitment program would have justified a refusal to consider reinstatement eligibles as a source (as happened later) they were in fact referred for consideration. Thus Personnel did not preclude their rehire, and such status did not alone impact upon the decision not to reemploy Carroll.

Carroll was the most experienced applicant, and her work at Dyess and elsewhere as a cashier was highly regarded. It is evident that Hammersmith welcomed her reappearance and sought to facilitate her reemployment. Either Carroll wore out her welcome with her persistent, somewhat presumptuous pursuit of the job, or by disclosing an intention to bid out quickly, or she was not hired on the instructions of Whitley because of her activities as a steward. Perhaps all such reasons entered into the

decision. Interestingly, the belief that she would bid out as promptly as possible was not given to her as a reason, nor did it provoke any discussion of her plans. According to both Hammersmith and Carroll, "hassling" or "harassment" was the only specific reason assigned.

The demeanor of the principal witnesses has not aided me. Hammersmith, Wiley, Carroll, Blair and Collins gave the impression of being straightforward. My conclusions thus are principally based on the logic of the situation, and in part upon both the shifting and contradictory defenses advanced by the several layers of management and the reliance I place upon the testimony of Helen Blair and Rozelle Collins, who took the risk of testifying against their immediate superior in circumstances where there was no apparent reason for them to misstate the facts. Aside from the statement they attribute to Whitley, there is, in fact, no evidence of animus toward the Union. Collins received a raise while steward, Carroll received excellent references after her period of activity as steward, and Hammersmith in the beginning was certainly helpful to Carroll in her effort to secure employment. I do not doubt that Carroll came to annoy Hammersmith, and to convey the impression that she must be hired, and that Hammersmith felt and resented the pressure. Carroll did not deny having said that she would be entitled to bid out immediately upon being hired. It is suspicious however, that neither of these reasons was used on the form recording the reason for nonselection, that the latter was never communicated to Carroll, and that the major thrust of the defense presented in the Inspector General investigation was the local recruitment program and its EEO component.

Respondent concedes that Whitley and Hammersmith had a conversation about Carroll's status as a former steward, after

Whitley was informed by Ibbotson that she had been the steward. While he claims that such knowledge caused him no "particular" concern, I reject his claim that he left the hiring decision totally to Hammersmith. Rather I credit the testimony of Blair and Collins that he told Hammersmith that the Commissary did not need any more Union activism, and I conclude that Hammersmith decided not to hire Carroll for that reason. No other persuasive reason is advanced for the nonselection of a highly qualified applicant, one of the few with relevant experience, and one whose previous work had been regarded as outstanding. Accordingly, I find that a violation of Sections 19(a)(2) and (1) of the Order has been established.

Recommendation

On the basis of the foregoing findings and conclusions, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. §2423.29(c):

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations thereunder, and Section 2400.2 of the Final Rules and Regulations, it is hereby ORDERED that the Department of the Air Force, Dyess Air Force Base, Abilene, Texas shall:

1. Cease and desist from:

(a) Refusing to employ Patricia Carroll, or any other applicant, because of membership in, or activity in behalf of, Local 2356, American Federation of Government Employees, AFL-CIO.

Appendix E

(b) Discouraging membership in Local 2356, American Federation of Government Employees, or any other labor organization, by discrimination in respect to any term or condition of employment, based upon considerations of union membership.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights assured by Executive Order 11491.

2. Take the following affirmative action in order to effectuate the purposes and policies of Executive Order 11491, as amended:

(a) Offer employment as a sales store checker, GS-3 intermittent, to Patricia Carroll, or if that job no longer exists, in a substantially similar position, without prejudice to the seniority or other privileges she would have enjoyed but for the discrimination, and make her whole by the payment of that sum of money which she would have earned between the date of discriminatory failure to hire and the date of offer of employment, less any amounts earned elsewhere during that period of time.

(b) Post at its Abilene, Texas, facility, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Base Commander and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Base Commander shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

Appendix E

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

s/ John H. Fenton
JOHN H. FENTON
Administrative Law Judge

Dated: March 21, 1980
Washington, D.C.

Office - Supreme Court, U.S.
FILED
MAY 18 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1539

In the Supreme Court of the United States

OCTOBER TERM, 1983

PATRICIA C. CARROLL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Barr v. *Matteo*, 360 U.S. 564 4

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 1

Bush v. *Lucas*, 647 F.2d 577, reh'g granted, No. 81-469 (June 13, 1983) 2, 3, 4

Harlow v. *Fitzgerald*, 457 U.S. 800 4

Constitution and statutes:

U.S. Const. Amend. I 1

Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.* 4

Exec. Order No. 11,491, *reprinted in* 5 U.S.C. 7101 note 1, 4

Section 19(a)(2) 2

5 U.S.C. 7116(a)(2) 5

5 U.S.C. 7118 5

5 U.S.C. 7118(a)(7)(C) and (D) 5

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1539

PATRICIA C. CARROLL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks damages from three civilian Air Force officials in their personal capacities (see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)) because they allegedly violated her First Amendment rights when they participated in a decision to reject her application for employment with the Air Force.

1. Petitioner was a civilian employee of the Air Force from July 1974 to May 1976. During part of that time, she was a union steward. In September 1978 she sought reemployment, but her application was rejected. Petitioner's union, on her behalf, then instituted an administrative proceeding under Exec. Order No. 11,491, *reprinted in* 5 U.S.C. 7101 note, which provides that a federal agency shall not "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure,

promotion, or other conditions of employment" (Section 19(a)(2)). Pet. App. 4a.[1]

An administrative law judge found that petitioner had been refused employment because of her prior union activities (Pet. App. 25a-39a). He ordered that petitioner be offered immediate employment and that she be given back pay from the date of the "discriminatory failure to hire" (*id.* at 38a). The ALJ's decision was reviewed by the Federal Labor Relations Authority (FLRA), which upheld the ALJ's findings but ruled that it lacked the authority to order either immediate employment or back pay (*id.* at 20a). The FLRA accordingly ordered that the Air Force give petitioner "first consideration * * * in filling any position for which she may be qualified" (*id.* at 21a).

Petitioner then brought this action in the United States District Court for the Northern District of Texas.[2] The district court dismissed the complaint on the authority of the court of appeals' decision in *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981). Pet. App. 10a-14a. The court of appeals initially reversed (*id.* at 3a-9a) but then granted rehearing and affirmed the dismissal of the complaint (*id.* at 1a-2a) on the basis of this Court's decision in *Bush* v. *Lucas*, No. 81-469 (June 13, 1983). The court of appeals explained (Pet. App. 2a):

> *Bush* v. *Lucas* involved an employee complaining of an adverse personnel action allegedly triggered by public statements by the employee. Administrative remedies were available and were exercised. The instant

---

[1]Our citations refer to the repaginated petition served on us on April 27, 1984.

[2]Petitioner initially sued the government as well as the individual respondents in their personal capacites, but the suit against the government was dismissed and petitioner did not appeal.

> case involves a former employee who complains of mistreatment in reemployment because of union activity during the period of employment. A measure of administrative remedies was available and was exercised. We cannot make a principled distinction between [the two cases] * * *.

2. The court of appeals was correct in its conclusion that this case is controlled by *Bush*. Petitioner's claim, like that of the employee in *Bush*, "arise[s] out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States" (*Bush*, slip op. 1). It is therefore "inappropriate * * * to supplement that regulatory scheme with" a *Bivens* remedy (*ibid.*).

Petitioner attempts to distinguish *Bush* in two ways (see Pet. 6). First, she asserts that because she was a disappointed applicant for employment, her remedies were more limited than those of the demoted employee in *Bush*. But petitioner had access to a remedial mechanism parallel to that available to the employee in Bush. She enjoyed the protection of a substantive prohibition against a refusal to hire based on union activity (see *Bush*, slip op. 18, 19); she could invoke an administrative process that provided for an adjudicative hearing and administrative review (see *id.* at 20); and she could have sought judicial review (see *ibid.*), although she apparently did not choose to do so.

The second and more substantial basis petitioner suggests for distinguishing *Bush* is that petitioner, unlike the employee in *Bush*, could not obtain reinstatement and back pay. But *Bush* did not hold that a remedial scheme must provide complete relief in order to preclude a *Bivens* action. On the contrary, the decision in *Bush* was explicitly premised on the assumption that the available remedies were less than complete (see slip op. 5 (footnote omitted)): "We

* * * assume that * * * civil service remedies were not as effective as an individual damages remedy and did not fully compensate [the employee] for the harm he suffered. * * * [W]e assume [that] a federal right has been violated and Congress has provided a less than complete remedy for the wrong."

The only requirements of *Bush* are that the remedial scheme address the wrong in issue and that it provide "meaningful" relief (see slip op. 1, 18, 19). The executive order remedy invoked by petitioner was explicity addressed to the wrong petitioner allegedly suffered, and petitioner received prospective relief. This relief cannot be regarded as less than meaningful merely because petitioner did not receive a compensatory payment of money; by virtue of the government's sovereign immunity and goverment officials' immunity from personal damages liability (see, *e.g., Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Barr* v. *Matteo*, 360 U.S 564 (1959)), prospective relief is frequently all that is available to a person claiming to have been wronged by the government.[3]

3. This case does not warrant the Court's review for the additional reason that the remedial scheme established by Exec. Order No. 11,491 and invoked by petitioner has been superseded by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*. The CSRA makes it an unfair labor practice "to encourage or discourage membership in any labor orgainzation by discrimination in connection with hiring, tenure, promotion, or other conditions of

---

[3]In addition, prospective relief of the form petitioner received is likely to be particularly effective in deterring wrongs of the kind petitioner alleged; a government personnel manager seeking to discourage union activity will certainly be concerned to avoid a remedial order that constitutes a major symbolic victory for the union and that requires the manager to acknowledge his wrongdoing.

employment" (5 U.S.C. 7116(a)(2)). The CSRA also contains its own remedial mechanism (see 5 U.S.C. 7118) and provides for back pay (see 5 U.S.C. 7118(a)(7)(C) and (D)). Future litigation in this area, therefore, will concern the adequacy of the CSRA remedy, not the executive order remedy invoked by the petitioner. The FLRA, in its opinion in this case, expressly left open the question whether it would have reached the same result under the CSRA (see Pet. App. 20a n. *). Accordingly, it would be premature for the Court to conclude that any question similar to that presented by this case will arise in the future under the CSRA.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1984

DOJ-1984-05